

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 16, 2015

v

HARRY ELSWORTH BURNHAM,

Defendant-Appellant.

No. 321830
Oakland Circuit Court
LC No. 2011-236422-FC

Before: MARKEY, P.J., and OWENS and GLEICHER, JJ.

PER CURIAM.

A jury acquitted defendant of two counts of first-degree criminal sexual conduct but convicted him of two counts of the lesser included offense of second-degree criminal sexual conduct for his sexual assault of two young children. The trial court originally sentenced defendant to concurrent prison terms of 86 months to 30 years' imprisonment. In a prior appeal, this Court remanded for resentencing based on an incorrectly scored guideline variable. See *People v Burnham*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2013 (Docket No. 311379). The trial court thereafter sentenced defendant to concurrent terms of 69 months to 30 years' imprisonment. Defendant contends that these new sentences amount to cruel and unusual punishment. Because defendant's sentences are within the minimum sentencing guidelines range of 36 to 106 months imprisonment, we affirm.

Defendant contends that his new concurrent sentences violate the constitutional guarantees against cruel and unusual punishment provided by US Const Am VIII and Const 1963, art 1, § 16, due to his advanced age and expression of remorse. As defendant failed to raise this challenge below, our review is limited to plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant's substantial rights were not impacted in this case because his sentences fell within the appropriate minimum sentencing guidelines range and are therefore presumptively proportionate.

Sentences that are proportionate to the seriousness of the offense and the offender are not cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004); *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). And a sentence within the guidelines range, like defendant's sentences, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "In order to overcome the presumption that the sentence is proportionate, a

defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate.” *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013); *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

As “unusual circumstances that would render the presumptively proportionate sentence disproportionate,” defendant notes that he is 67 years old and “that he made an unequivocal admission of guilt and expressed sincere remorse for his conduct.” Neither of these conditions is compelling enough to render defendant’s sentences unconstitutionally harsh. A court is not required to consider a defendant’s advanced age in determining the proportionality of a sentence that may surpass the defendant’s lifespan. See *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). In addition, an expression of remorse is not an objective or verifiable factor that could support a downward departing sentence. See *People v Daniel*, 462 Mich 1, 11-12; 609 NW2d 557 (2000).

Defendant’s reliance on *Solem v Helm*, 463 US 277, 303; 103 S Ct 3001; 77 L Ed 2d 637 (1983), in support of his challenge is misplaced. In *Solem*, the defendant received a life sentence for writing a fraudulent check for \$100 because of his past criminal history. The United States Supreme Court found this punishment cruel and unusual because the defendant

received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible except of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.. [*Id.* at 303.]

In this case, defendant was convicted of serious crimes of a sexual nature against young children. There is no record indication that defendant was treated unusually harshly when compared to similar criminals in other jurisdictions. His sentences were within the minimum sentencing guidelines range and are presumptively proportionate. Accordingly, we discern no grounds to grant defendant relief from his punishment.

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher